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No. 93-518

Supreme Court, U.S.

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In The
Supreme Court of the United States

October Term, 1993

— ♦ —
FLORENCE DOLAN,

Petitioner,

v.

CITY OF TIGARD,

Respondent.

— ♦ —
On Writ Of Certiorari To The
Supreme Court Of The State of Oregon
— ♦ —

BRIEF OF
GEORGIA PUBLIC POLICY FOUNDATION
AND
SOUTHEASTERN LEGAL FOUNDATION
AS AMICI CURIAE IN SUPPORT OF PETITIONER
— ♦ —

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INTEREST OF AMICI

The Georgia Public Policy Foundation and Southeastern Legal Foundation submit their brief as *amici curiae* in this case. The parties have consented to the filing of this brief, and their consent letters have been filed with the Clerk of this Court.

The Georgia Public Policy Foundation is a non-partisan, non-profit research and education foundation. Its members include more than 1500 citizens of Georgia, including numerous current or former U.S. and state

legislators, local elected officials, and the executive officers of more than one hundred small businesses, corporations, and trade associations operating within Georgia.

The Georgia Public Policy Foundation conducts research to develop practical proposals on public policy questions of significant concern to the people of Georgia. Its members believe that the well-being and future hopes of our nation are best advanced by public policies that spur economic growth, enhance individual opportunity, empower citizens, and defend traditional economic principles. In recognition of this, the organization includes in its areas of concern the government's treatment of private property.

Southeastern Legal Foundation ("Southeastern") is a public interest law firm which provides the courts with the views of those who support limited government, individual economic freedom and the free enterprise system. Southeastern's function is to engage in litigation in support of these principles, and to oppose governmental abuse of authority at all levels. In the course of carrying out this mission, Southeastern provides direct legal representation to parties in civil litigation, and files *amicus curiae* briefs in selected cases, where important public policy issues are presented. Southeastern appeared as counsel of record in this Court for the petitioner in *North-eastern Florida Contractors v. Jacksonville*, 113 S.Ct. 2297 (1993), and has appeared as *amicus curiae* in numerous cases, most recently in *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 112 S.Ct. 2886 (1992).

As an advocate for individual economic freedom and private property rights, Southeastern presents the views

of its supporters who believe that such individual rights should be protected against governmental intrusion. Southeastern believes that the Oregon Supreme Court's decision in this case constitutes a failure to protect private property rights and a departure from this Court's precedents. Southeastern believes this case is an opportunity for this Court to reaffirm its strong support for private property rights.

STATEMENT OF THE CASE

Amici Georgia Policy Foundation and Southeastern Legal Foundation adopt the statement of the case contained in the brief of the Petitioner.

SUMMARY OF ARGUMENT

In order to effectively protect private property rights from arbitrary and intrusive governmental regulations, this Court should reaffirm the standard articulated in *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141 (1987). Since the *Nollan* ruling, courts have been split as to its implications. Some courts have either ignored *Nollan* or reduced its application to physical takings, thus holding *Nollan* inapplicable to cases involving regulatory takings. The fact that some courts have declined to follow *Nollan*, or limited its application to only possessory takings cases, attests to the need for this Court to promulgate a clear and concise interpretation of the *Nollan* standard for courts to apply to all takings cases.

The Oregon Supreme Court applied the wrong standard of judicial scrutiny in this case. In rejecting the heightened scrutiny analysis this Court promulgated in *Nollan*, the Oregon Supreme Court essentially applied the "rational basis" test that was specifically rejected in *Nollan*. Believing the city merely needed to demonstrate a reasonable relationship between the impacts of the development and the dedication requirements, the Oregon Supreme Court accepted the city's unsubstantiated findings as supporting the dedication conditions imposed by the city. The dissent would apply the heightened scrutiny standard adopted in *Nollan* by requiring the respondent to produce more than general policy statements and unsubstantiated findings in order to justify the imposition of an exaction.

The standard utilized by the Oregon Supreme Court is essentially a rational basis test. If the decision of the Oregon Supreme Court is affirmed, the takings analysis will be reduced to nothing more than a pleading requirement. In spite of Justice Scalia's opinion in *Nollan*, that "our opinions do not establish that these standards are the same as those applied to due process or equal protection claims," the Oregon court applied the rational basis test. A rational basis test is inadequate to protect property rights from the increasing tendency of state and local governments to extort public improvements from property owners as a prerequisite to granting development permits. Only by requiring a strong factual showing that the specific effects of the development will be mitigated by the condition imposed, will property rights be secure.

Finally, the protection of property rights was at the core of the purposes for which our government was

formed, and property rights should be given the same protection as all other civil rights.

ARGUMENT

I.

THE STANDARD TO BE APPLIED IN TAKINGS CASES, REQUIRING AN EXACTION TO SUBSTANTIALLY ADVANCE A LEGITIMATE STATE INTEREST, NEEDS TO BE CLEARLY DEFINED AND UNAMBIGUOUSLY EMBRACED BY THIS COURT.

In order to effectively protect private property rights from arbitrary and intrusive governmental regulations, this Court should reaffirm the standard articulated in *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141 (1987). The Nollans desired to demolish the existing bungalow on their beachfront lot and replace it with a larger home. The California Coastal Commission would only award a coastal development permit subject to the condition that the Nollans allow the public an easement across their property. The California Court of Appeal upheld the imposition of the easement condition by applying the reasoning of an earlier case. *Grupe v. California Coastal Commission*, 166 Cal.App.3d 148, 212 Cal.Rptr. 578 (1985) (finding that even if there was only an indirect relationship between the access exacted and the need to which the project contributed, the imposition of the access condition on the development permit was sufficiently related to burdens created by the project).

The U.S. Supreme Court found that the Coastal Commission's exaction of a public easement as a condition to

the granting of a coastal development permit amounted to "out and out extortion," and was a taking without compensation in violation of the Fifth Amendment. *Id.* at 837, 839. The court invalidated the condition, finding that the exaction failed to substantially advance a legitimate state interest. *Id.* at 841, 842. This Court held that the Coastal Commission's exaction of a public easement failed to establish an "essential nexus" between the exaction and the substantial advancement of a legitimate state interest. While it is apparent that the *Nollan* court was contemplating a heightened scrutiny standard in reviewing exactions, it remains unclear as to exactly what the court intended.¹

Since the *Nollan* ruling, courts have been split as to its implications. Some courts have either ignored *Nollan* or reduced its application to cases involving physical takings, thus holding *Nollan* inapplicable to cases involving regulatory takings. See Delaney, *Exactions: From Early Subdivision Dedications to User Impact Fees and Linkage in the Post-Nollan Era*, C750 ALI-ABA 859 (1992). See also, *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991), *cert. denied*, ___ U.S. ___, 118 L. Ed. 2d 593 (1992) (The Ninth Circuit used a "rational relationship" test to justify conditioning certain non-residential building permits on the payment of a fee into a low-income housing trust fund); *Blue Jeans Equities*

¹ The *Nollan* court acknowledges that its standard is somewhat vague in saying: "Our cases have not elaborated on the standards for determining what constitutes a 'legitimate state interest' or what type of connection between the regulation and the state interest satisfies the requirement that the former 'substantially advance' the latter." *Nollan* at 834.

West v. City and County of San Francisco, 4 Cal.Rptr.2d 114 (Cal.Ct. App. 1992), *cert. denied*, ___ U.S. ___, 121 L. Ed. 2d 135 (1992) (Holding *Nollan*'s heightened scrutiny requirement applicable only to possessory rather than regulatory takings).

Other courts, meanwhile, have recognized *Nollan* as establishing a heightened level of scrutiny in *all* takings cases. See *Seawell Associates v. City of New York*, 542 N.E.2d 1059, *cert. denied*, 493 U.S. 976 (1989) (holding regulatory takings require "semi-strict or heightened judicial scrutiny" of the nexus between the monetary exaction and the state interest); *Surfside Colony, Ltd. v. California Coastal Commission*, 226 Cal. App.3d 1260 (1991) (specifically denouncing the rational basis test in favor of a heightened scrutiny standard of constitutional review in takings cases).

The fact that some courts have declined to follow *Nollan*, or limited its application to only possessory takings cases, attests to the need for this Court to promulgate a clear and concise interpretation of the *Nollan* standard for courts to apply to all takings cases. The present case exemplifies the need for clarification of the scope and meaning of the *Nollan* ruling, as the Oregon Supreme Court fails to recognize *Nollan* as requiring a heightened level of scrutiny for takings cases. Rather, the court relies on the Ninth Circuit's opinion in *Commercial Builders*, which cites *Parks v. Watson*, 716 F.2d 646 (CA9 1983) for the position that *Nollan* did not change the level of scrutiny. *Parks*, however, pre-dates *Nollan*, and any reliance on it is therefore misplaced. An opportunity now exists for this Court to reconcile court decisions, such as

that in this case and in *Commercial Builders*, with the standard established in *Nollan*.

II.

THE STANDARD APPLIED BY THE OREGON SUPREME COURT, REQUIRING THAT THE EXACTION REASONABLY RELATE TO A LEGITIMATE STATE INTEREST, HAS BEEN SPECIFICALLY REJECTED BY THIS COURT.

The Oregon Supreme Court applied the wrong standard of judicial review in this case. In rejecting the heightened scrutiny analysis this Court promulgated in *Nollan*, the Oregon Supreme Court essentially applied the "rational basis" test that was specifically rejected in *Nollan*. The Oregon Supreme Court justified its application of a "reasonably related" test by failing to recognize this Court's requirement that heightened judicial scrutiny be used to examine the relationship between a proposed exaction and a legitimate governmental interest.

In *Nollan*, the Court did not purport to abandon the generally recognized "reasonably related" test . . . thus, we are unable to agree with the petitioners that the *Nollan* court abandoned the "reasonably related" test. *Dolan v. City of Tigard*, 854 P.2d 437, 441 (1993)

In applying the reasonable relation test, the Oregon Supreme Court essentially applied the rational basis test proposed by Justice Brennan in his *Nollan* dissent. The *Nollan* majority explicitly rejected Justice Brennan's dissent, which advocated the upholding of an exaction where the state "could rationally have decided that the measure adopted might achieve the state's objective."

Nollan, at 3152 (Justice Brennan dissenting), quoting *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981). In dismissing Justice Brennan's proposed "rational basis" analysis, Justice Scalia wrote:

Contrary to Justice Brennan's claim, *post*, at 3150, our opinions do not establish that these standards are the same as those applied to due process or equal protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved, *Agins v. Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980), . . . Justice Brennan relies principally on an equal protection case . . . and two substantive due process cases . . . in support of the standards he would adopt. But there is no reason to believe (and the language of our cases gives some reason to disbelieve) that so long as the regulation of property is at issue the standards for takings challenges, due process challenges, and equal protection challenges are identical. *Nollan*, at 834, fn. 3.

It is clear that the standard advanced by Justice Scalia in *Nollan* is more rigorous than the rational basis analysis or the virtually synonymous reasonable relation standard utilized by the Oregon Supreme Court. Justice Scalia clearly repudiates Justice Brennan's dissenting opinion which equates the test to be applied in takings cases to the rational basis test applied to due process or equal protection claims.

In spite of this clear pronouncement by the *Nollan* majority that a heightened level of scrutiny controls, the

Oregon Supreme Court interpreted *Nollan* as holding "that where there is no evidence of a nexus between the development and the problem that the exaction seeks to address, the exaction cannot be upheld." A-12, citing *Commercial Builders v. Sacramento*, 941 F.2d at 874-875. Since the Oregon Supreme Court was only looking for *any* evidence of a nexus, it erroneously relied upon the highly speculative and unsubstantiated evidence offered by the city to justify the conditions it placed upon the awarding of the development permit.

A. The evidence relied upon to justify the exaction requirement was insufficient to satisfy *Nollan's* heightened scrutiny requirements.

The issue in this case "is whether the city has demonstrated the required relationship between the conditions that it attached to its approval of petitioners' proposed land use and the expected impacts of that land use." *Dolan*, 854 P.2d at 438. Thus, for the development permit to meet the *Nollan* test, there must be an "essential nexus" between the permit condition and the impact of the proposed development.²

Believing the city merely needed to demonstrate a reasonable relationship between the impacts of the development and the dedication requirements, the Oregon

² In *Nollan*, the nexus at issue was between the identified harm and the condition imposed, not between the proposed use and the asserted public harm. See Groen, *Nollan v. California Coastal Commission: An Update*, C549 ALI-ABA 325 (1990)

Supreme Court accepted the city's unsubstantiated findings as supporting the dedication conditions imposed by the city. *Dolan*, 854 P.2d at 443. Neither the Oregon Supreme Court's opinion nor the speculative statements by the City of Tigard Planning Commission demonstrate how the proposed development will create the need for the exaction of the easements. The only evidence submitted by the respondent, which is thoroughly refuted by the dissent,³ is remarkably similar to that relied upon by the California Court of Appeal in *Grupe v. California Coastal Commission*, 166 Cal.App.3d 148, 212 Cal.Rptr. 578 (1985).⁴ The "indirect relationship" accepted by the *Grupe* court is not sufficient to meet the "substantial relationship" required by the *Nollan* court.

³ The dissent of Peterson, J., believes the evidence relied upon by the majority is insufficient to satisfy federal precedent. The dissent demonstrates at length how the evidence relied upon by the majority "show[s] the resolve of the city to get the easements and . . . in no way establish that the easements necessarily are needed because of increased intensity of use of petitioners' (or anyone else's) property." Dissent, A-23.

⁴ The *Nollan* court, in reversing the California Court of Appeal, cites *Grupe* as the case relied upon by the Court of Appeal in judging the easement exaction to not be a violation of the Takings Clause. "In that case [*Grupe*], the court had found that so long as a project contributed to the need for public access, even if the project standing alone had not created the need for access, and even if there *was only an indirect relationship between the access exacted and the need to which the project contributed*, imposition of an access condition on a development permit was sufficiently related to burdens created by the project to be constitutional." *Nollan*, at 830, citing *Grupe*, 177 Cal.App.3d, at 723 (emphasis added).

Utilizing the reasonable relationship test, the Oregon Supreme Court accepted the general and factually unsupported statements of the respondent as supporting the dedication requirements. The nature of the evidence presented by the city's order, as analyzed by the dissent, establishes only a tenuous relationship between the expansion of the petitioner's store and the exactions. The following excerpt from the "City of Tigard Planning Commission Final Order," which relates to the pedestrian/bicycle pathway easement, is devoid of any factual findings.

We are persuaded that the transportation needs of petitioners' employees and customers and the increased traffic congestion that will result from the development of petitioners' land do have an essential nexus to the development site, and that this condition, therefore, is reasonably related to the impact of the expansion of their business. *Dolan*, 854 P.2d at 443.

This statement reflects the planning commission's reliance on supposition, similar to the "sufficiently related" standard used by *Grupe*, and subsequently rejected by *Nollan*.

The dissent of Peterson, J., of the Oregon Supreme Court, challenges the majority's acceptance of the planning commission's justification for demanding the exactments. In requiring a certain level of specificity to establish the essential nexus, the dissent would require the planning commission to conduct a study to prove a direct and proportionate link between the proposed development and its adverse public impacts.

In establishing that the need for the exactions arises from an increased intensity of use, the government must show more than a theoretical nexus. It must show that the granting of the permit probably will create specific problems, burdens, or conditions that theretofore did not exist, and that the exaction will serve to alleviate the specific problems, burdens, or conditions that probably will arise from the granting of the permit. More than general statements of concern about increased traffic or public safety are required to support, as permissible regulation, what otherwise would be a taking. *Dolan*, 854 P.2d at 444 (Peterson, J., dissenting).

The dissent would apply the heightened scrutiny standard adopted in *Nollan* by requiring the respondent to produce more than general policy statements and unsubstantiated findings in order to justify the imposition of an exaction.

B. This Court should take this opportunity to establish a strong evidentiary standard to be used in reviewing the constitutionality of exactions.

The standard utilized by the Oregon Supreme Court is essentially a rational basis test. While Justice Brennan would apply the rational basis test to the nexus requirement, the *Nollan* court clearly repudiated a standard that would merely rubber stamp any rational reason put forth by the regulatory entity.

We view the Fifth Amendment's Property Clause to be more than a pleading requirement,

and compliance with it to be more than an exercise in cleverness and imagination. *Nollan* at 841.

If the decision of the Oregon Supreme Court is affirmed, the takings analysis will be reduced to nothing more than a pleading requirement. As the dissenting opinion of the Oregon Supreme Court points out, "if all that need be shown is that easements are needed for a legitimate public purpose, the constitutional requirement evaporates. The critical question before us is whether the order shows an increased intensity of such magnitude that it creates the need for the exaction of the easements." A-23. The dissent correctly interprets *Nollan* to require that "findings [of fact] demonstrate that the increased intensity of use requires the exaction." *Dolan*, 854 P.2d at 447.

The Oregon Supreme Court standard of review is not a heightened standard but rather "a paradigm of judicial restraint." *F.C.C. v. Beach Communications, Inc.*, 113 S.Ct. 2096, 2101 (1993) (Fifth Amendment equal protection challenge to provision in Cable Communication Policy Act). An affirmation of the Oregon decision will essentially uphold any exaction requirement "if there is any reasonably conceivable state of facts that could be a rational basis for the . . . [exaction]." *Id.*; See e.g., *Heller v. Doe By Doe*, 113 S.Ct. 2637 (1993) (courts are compelled under rational basis to accept legislature's generalizations even when there is imperfect fit between means and ends). In spite of Justice Scalia's opinion in *Nollan*, that "our opinions do not establish that these [takings] standards are the same as those applied to due process or equal protection claims," the standard applied by the Oregon court is nothing more than the rational basis test. *Nollan*, 483 U.S. at 834, fn. 3.

While Justice Scalia balks at accepting an analogy between the equal protection or due process standards and the Fifth Amendment taking standard, he made it apparent that there must be a close and specific link between the development impacts and the conditions of approval. In dissent, Justice Brennan characterized the majority's opinion as an "unusual demand for a precise match between the condition imposed and the specific type of burden on access created by appellants." *Id.* at 849. Requiring a close fit between the exaction and the burden is analogous to the strict scrutiny standard under the Equal Protection Clause of the Fourteenth Amendment. The strict scrutiny test "ensures that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate . . ." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989). In the case that labeled the most exacting judicial examination as "strict scrutiny," the court wrote:

We have held that "in order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 305-07 (plurality opinion) (citations omitted).

Notwithstanding that the standard of an equal protection claim is "quite different" from that of a taking analysis, Amici believe that an analogous standard could serve to adequately protect property rights.

Amici respectfully urge this Court to adopt a standard that requires a strong evidentiary showing of causation between the development and the public harm in order to justify the exaction. In equal protection cases involving a racial classification, this Court requires that the use of such classifications be "narrowly tailored" to accomplish the compelling government interest. *City of Richmond v. J.A. Croson*. Furthermore, the classifications must "have a strong basis in evidence" to show their necessity. *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277 (1986). By expounding a test that requires the exaction to specifically remedy the public harm directly caused by the development, this Court would be protecting property rights as stringently as it protects other civil rights.

III.

PROPERTY RIGHTS NEED TO BE PROTECTED AS STRINGENTLY AS OTHER CIVIL RIGHTS.

A rational basis test is inadequate to protect property rights from the increasing tendency of state and local governments to extort public improvements from property owners as a prerequisite to granting development permits. The dissent below believed this to be the case, stating:

state and local governments attempt to further particular goals by placing limitations on uses of private property that will only be lifted if the property owners 'dedicate' some portion of their property to the particular government program. The temptation, particularly in times of limited tax revenues, is to place the primary

burden for funding projects on the shoulders of those whose property happens to be in the neighborhood of the proposed projects, whether or not the projects bear any relationship to the property or to the uses to which the property is put. *Dolan*, 854 P.2d at 447.

Analogous to the growth in unfunded federal mandates being imposed upon state and local governments, there is a growing trend in state and local governments to make unfunded public improvements at the expense of individual property owners. Only by requiring a strong factual showing that the specific effects of the development will be mitigated by the condition imposed, will property rights be secure.

The danger in this case stems from the Oregon court's uncritical deference to the city's good intentions. There is no reason to believe that the city was motivated by anything other than a desire to help the public, but good intentions are not an adequate protection against abuse of power. As Justice Holmes once noted, "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent." *Olmstead v. United States*, 277 U.S. 438, 479 (1928).

It is never difficult for a government to find noble motives for its actions. Most infringements on personal liberty are prompted by quite reasonable, even laudable, impulses. See, e.g., *United States v. 92 Buena Vista Ave.*, 113 S.Ct. 1126 (1993) (drug enforcement through civil forfeiture cannot override rights of third-party owners who obtain a property interest without any knowledge of the related drug offense); *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, 498 U.S. 1081 (1991)

(state's desire to compensate crime victims was laudable, but its efforts violated the first amendment); *Minnick v. Mississippi*, 498 U.S. 146 (1990) (right to counsel during police interrogation); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (city's effort to remedy past discrimination was nevertheless a violation of the equal protection clause). The essence of constitutional protection is a declaration that, no matter how high-minded the goal, there are some things that a government simply may not do.

In the final analysis, this court must determine what place property rights have in the constitutional hierarchy. This Court has recognized the interplay between property rights and other civil rights. "The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a 'personal' right, whether the 'property' in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other." *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972).

In fact, property well may be considered the foundation for the other civil rights that we enjoy. John Locke, whose writings influenced the leaders of the American Revolution and the framers of the Constitution more than any other single philosopher, described the preservation of property as "the end of government, and that for which men enter into society." John Locke, *Of Civil Government* ¶ 138, quoted in Epstein, *Takings: Private Property and the Power of Eminent Domain* 14 (1985). Locke even went so far as to say, "Lives, Liberties, and Estates, which

I call by the general Name, *Property*." Locke, *The Second Treatise of Government* § 123 (revised ed. P. Laslett ed. 1965) (emphasis in original).

This case presents this Court with the opportunity to declare whether property rights have equal stature with all other constitutional rights, or whether they are simply an interesting nostalgic footnote. The interpretation of the Supreme Court of Oregon, if it stands, will relegate traditional property rights to the pages of history books, where they will become merely a backdrop for the state's power to legislate without liability.

CONCLUSION

For all of the foregoing reasons, *amici* respectfully request that this Court reverse the decision of the Supreme Court of the State of Oregon.

Respectfully submitted,

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